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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-308

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, Appellants

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania; And Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, Appellants

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; And Montgomery Publishing Company, Appellant

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; And Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, Appellants

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; and Montgomery Publishing Company, Appellant

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

MOTION TO DISMISS

Appeal From the Judgments of the Supreme Court of Pennsylvania

Of Counsel:**JONATHAN VIPOND, III****EVE L. CUTLER**

**1414 Three Penn Center Plaza
Philadelphia, Pa. 19102**

RALPH S. SPRITZER**PAUL BENDER**

**3400 Chestnut Street
Philadelphia, Pa. 19104
Attorneys for Appellees**

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Pursuant to Rule 16 of this Court's rules, appellees move that the appeals from the judgments of the Supreme Court of Pennsylvania denying appellants' petitions for writ of mandamus and prohibition be dismissed for want of a substantial federal question.

STATEMENT

Although the consolidated appeals docketed by appellants (all of whom are members of the press) arise out of three separate criminal proceedings to which appellants sought access, the issues in all three cases are the same. In each instance, a criminal defendant had been indicted for murder and was awaiting trial or retrial.¹ All of the cases were notorious and the crimes charged had been the subject of extensive coverage in the news media.² In each case, pretrial motions were filed by the respective defendants seeking the suppression of evidence alleged to have been unconstitutionally obtained, and each defendant further moved, pursuant to the Pennsylvania Rules of Criminal Procedure,³ that the proceedings be held in

1. The defendant in the Delaware County case, W.A. "Tony" Boyle, had been previously tried and the conviction set aside on appeal.

2. The Boyle case is described by appellants as involving a charge of an "execution-style" murder, and the extensive publicity it generated had led to a change of venue. The two Montgomery County cases involved, respectively, the murder of a policeman and of a young girl. The Montgomery County cases have now been tried. The Boyle case is still awaiting retrial.

3. The relevant Rules are set forth in the Jurisdictional Statement. Rule 323 (f) and (g) authorize the trial judge, on motion of the defendant, to exclude spectators and to impound the hearing record until such time as it is determined that the interests of justice require disclosure. Rule 326 authorizes the court, acting on its own motion or motion of either party, to issue a special order in a widely-publicized or sensational case "governing such matters as extra-judicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury. . . ."

camera and that confidentiality be maintained pending further order of the court. The respective trial judges issued orders providing for closure of the hearings, impoundment of the hearing records and the maintenance of confidentiality by those involved in the proceedings. Appellants subsequently moved to vacate the orders of the trial judges and to open the then-pending suppression hearings to the press. Following denial of their motions, appellants unsuccessfully sought relief in the Supreme Court of Pennsylvania. This appeal challenges the orders of that court on the ground that the pertinent State Rules of Criminal Procedure violate the First and Sixth Amendments of the Constitution as made applicable to the States by the Fourteenth.

The Questions Are Not Substantial

In support of the judgments below, we submit, *first*, that Pennsylvania's authorization of protective orders to avoid pretrial disclosure of incriminating matter that a defendant has a constitutional right to suppress is a reasonable and appropriate measure of the kind that this Court has approved; *secondly*, that the Sixth Amendment guarantee that "*the accused* shall enjoy the right to a speedy and public trial" provides no basis for holding that members of the press can compel the State to conduct in public a *pretrial* proceeding that it has undertaken to conduct *in camera* at the instance of the accused; and, *thirdly*, that, although the press has broad freedom to publish, free from governmental interference, such information as it has independently obtained, it has no First Amendment right to require the Government to conduct governmental business or proceedings in a manner that will furnish it with news.

1. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court felt obligated to set aside a state court conviction for murder because of the likelihood that the defendant's con-

stitutional right to a fair trial had been impaired by pretrial newspaper publicity. The "cure," it said, "lies in those remedial measures that will prevent the prejudice at its inception. The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363.⁴ Only last Term, citing the *Sheppard* case, the Court restated its conviction that trial judges must employ such measures before prejudicial information enters the public domain. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976). The Chief Justice's opinion for the Court pointed out that "[p]rofessional studies have filled out these [Sheppard] suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police and witnesses may say to anyone." *Id.* at 564. The opinion notes further (*id.*, n.8), "closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies." The separate opinion of Mr. Justice Brennan likewise observes that "judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press" (*id.* at 601).⁵

We do not suggest that this Court has had occasion to examine the particular rules here challenged. We do stress that it has not merely invited, but has held it to be the duty of, trial judges to adopt appropriate measures to

4. The *Sheppard* Court went on to state (*ibid*):

Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

5. His opinion also notes (*id.* at 587) that "[n]o one can seriously doubt . . . that unmediated prejudicial pretrial publicity may destroy the fairness of a criminal trial. . . ."

safeguard the defendant's right to an impartial jury and a fair trial. The rules here in question, as we shall point out, follow closely the considered suggestions made in professional studies and are appropriately tailored to a critical need.

The American Bar Association Project on Minimum Standards for Criminal Justice has addressed the question of excluding the public, *inter alia*, from hearings on motions to suppress evidence on the ground that the evidence will be inadmissible at trial and is therefore likely to interfere with the right of fair trial. Its proposed rule states:

Motion to exclude public from all or part of pretrial hearing.

In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemina-

nation of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury.⁶

Rule 323 of the Pennsylvania Rules (J.S. 3-5) follows substantially the same approach, but is narrower in its coverage in that it authorizes closure only in the case of a pretrial motion to suppress evidence alleged to have been obtained in violation of a defendant's constitutional rights.⁷

In addition to their action closing the suppression hearings and sealing the hearing records, the trial judges here ordered, pursuant to Rule 326, that the personnel involved refrain from making extrajudicial statements concerning the pending proceedings. Rule 326 is the precise counterpart of a proposed rule ("Provisions for Special Orders in Widely Publicized and Sensational Cases") recommended by a Judicial Conference committee for adoption by United States District Courts.⁸

The reasons for a rule like Pennsylvania's Rule 323 are compelling. In the first place, the Rule is confined to motions to suppress unconstitutionally obtained evidence. When such a motion, sufficient on its face, is filed, it becomes apparent that the defendant is seeking the suppression or return of evidence which, if his allegations prove true, should never have come into the hands of the authorities in the first place. In short, the very function of the motion to suppress is to vindicate the protected rights of privacy and of freedom from testimonial compulsion. If the motion is well-founded, it surely is reason-

6. American Bar Association, Standards Relating to Fair Trial and Free Press, Approved Draft, p.7 (1968).

7. Also, such action may be taken only when the defendant moves for closure.

8. See Committee on the Operation of the Jury System, Report on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, 409 (1968). The committee was chaired by Chief Judge Irving R. Kaufman of the Second Circuit and consisted of twelve federal judges.

able to restore, so far as possible, the *status quo ante*. If the claim of constitutional violation is not proved and the motion to suppress is denied, the evidence of course becomes available for use at the public trial of the defendant.

Secondly, there can be no doubt that the subject matter of a non-frivolous motion to suppress—whether it relates to a confession, to contraband or to other incriminatory matter—is apt to be highly prejudicial. Since the full extent of its prejudicial character may be unclear before the facts and issues are fully developed at the trial itself, there is need for a prophylactic rule when the defendant makes a sufficient allegation of the need for interim protection. The considerations that require a court to hear a motion to suppress outside the presence of an impaneled jury (see *Jackson v. Denno*, 378 U.S. 368 (1964); F.R. Crim. Pro., Rule 41(e)) likewise justify the conduct of such a pretrial hearing outside the presence of the community of potential jurors.⁹ This is particularly true where, as here, the crimes that are the subject of the indictments are sensational and have been widely publicized.

So far as the application of Rule 326 is concerned, it suffices to point out that in *Sheppard v. Maxwell*, this Court specifically held it to be the duty of the trial judge, in a notorious case, to "control the release of leads, information and gossip to the press by police officers, witnesses and counsel for both sides" (384 U.S. at 359). In the instant cases, it would have been a futility to close the suppression hearings while leaving the parties, witnesses,

9. Appellants make the remarkable suggestion that the courts below failed to consider the less restrictive alternative "of preserving the criminal defendant's right to a fair trial" by "impaneling and sequestering [the] jury prior to the pretrial suppression hearing" (J.S. 12). Suppression hearings typically occur weeks or months before trial. In the Boyle case, the order of closure was entered on May 2, 1977, and trial is scheduled to take place in January, 1978.

counsel and court personnel free to issue extrajudicial statements.¹⁰

2. Appellants' reliance upon the Sixth Amendment¹¹ finds no support in decisions of this Court and would require a strained construction of its provisions—*first*, because the reference to a "speedy and public trial" does not embrace pretrial proceedings, and, *secondly*, because the rights guaranteed by the Amendment run to "the accused."

(a) The only decision of this Court cited by appellants for the proposition that the "public trial" provision of the Sixth Amendment applies to pretrial proceedings is *Kirby v. Illinois*, 406 U.S. 682 (1972). *Kirby*, however, implies nothing of the kind. It holds simply that the *right to counsel* attaches "at or after the initiation of adversary judicial criminal proceedings" (*id.* at 689). That, of course, follows from the specific guarantee of the Amendment assuring defendants the assistance of counsel in "all criminal prosecutions." It nowise detracts from the view, long accepted by this Court, that the trial itself commences with the process of selecting the petit jury. See, e.g., *Hopt*

10. It is unnecessary for this Court to consider whether the arbitrary closure of judicial proceedings, even of a pretrial nature, would admit of a remedy. It cannot be assumed that in such a case the Supreme Court of Pennsylvania would fail to exercise its supervisory powers. In all events, it cannot be denied that the crimes here involved were sensational and that public exposure of the efforts of the defendants to suppress evidence alleged to have been unconstitutionally obtained carried a latent threat of prejudice to the conduct of a fair trial.

11. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

v. Utah, 110 U.S. 574 (1884); *Shields v. United States*, 372 U.S. 583 (1963); *cf. F.R. Crim. Pro.*, Rule 43 (Presence of the Defendant).¹²

The facts of the two lower court cases upon which appellants rely (J.S. 14) are far removed from the case at bar. In *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969), the court found that the defendant's rights had been violated where the public was excluded from a suppression hearing held *after* the commencement of trial, where "there was no need to exclude the public" (*id.* at 607) because the jury had retired from the courtroom and was under an order of sequestration, and where the defendant had objected to closing of the courtroom. In these circumstances, the court concluded (*id.* at 608), the exclusion could not be "justified by any necessity to protect the defendant . . .".

United States v. Clark, 475 F.2d 240 (2d Cir. 1973), was an appeal from a narcotics conviction. Prior to trial, the defendant moved to suppress drugs seized from him as he was attempting to board an aircraft. The government thereupon moved to exclude defendant Clark and the public from the hearing on the ground that the proceedings might disclose the precautions used by the authorities to identify potential skyjackers. The motion was granted and the entire proceedings were held *in camera*, although only a "minute portion of the hearing testimony" (*id.* at 246) related to matters within the realm of security. Finding that Clark had not waived his right to be present and that his exclusion deprived him of the right of confrontation, the right to assist his counsel and the right to public trial, the court set aside the conviction. Whatever comfort appellants might derive from the court's view that "the right to public trial should extend to suppression hearings" (*id.* at 247) is immediately dispelled by the court's emphatic statement that the right is "*his* [the accused's]

12. See, also, *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949).

right" (*id.* at 246, emphasis in original), rather than a right of the public.

(b) As noted above, the constitutional command is that "*the accused* shall enjoy the right to a speedy and public trial." This provision is exclusively for the protection of the defendant; it confers no legally enforceable rights upon the press. Appellants do not cite—nor has research uncovered—any case in which anyone other than the defendant has been held entitled to invoke the Sixth Amendment's public trial guarantee. Rather, "[t]he Sixth Amendment right to a public trial is a right of the accused, *and of the accused only*." *Geise v. United States*, 265 F.2d 659, 660 (9th Cir. 1959), *cert. denied*, 361 U.S. 842 (emphasis added). See also *United States v. Eisner*, 533 F.2d 987, 993-994 (6th Cir. 1976); *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971) ("Public trial is essentially a right of the accused.").

This Court considered the public trial guarantee of the Sixth Amendment in *In Re Oliver*, 333 U.S. 257 (1948). It referred there to "[t]his nation's accepted practice of guaranteeing a public trial *to an accused*," *id.* at 266 (emphasis added) and then set forth with approval the "frequently quoted" statement in 1 Cooley, *Constitutional Limitations* (8th ed. 1927) at 647 (emphasis added):

The requirement of a public trial is *for the benefit of the accused*; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Since the Sixth Amendment right is that of the accused, numerous cases uphold the defendant's decision to waive his right when he concludes that publicity would harm, rather than support, his legitimate interests. *E.g.*, *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949).

The court in *Sorrentino* recognized that, while Sixth Amendment rights "are in a broad sense for the protection of the public generally they are in a very special sense privileges accorded to the individual member of the public who has been accused of crime." Thus "a defendant may well conclude that in his particular situation his interests will be better served by foregoing the privilege than by exercising it. . . . To deny the right of waiver in such a situation would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused." *Id.* at 722-723. With regard to the particular controversy in this case—that of the news media seeking to invoke the Sixth Amendment to defeat the interest of the accused—see Judge Fuld's thoughtful opinion for the New York Court of Appeals in *United Press Association v. Valente*, 308 N.Y. 71, 80, 123 N.E. 2d 777, 780 (1954):

The public does unquestionably have an interest in seeing that every person accused of crime shall have a fair trial and not [be] denied any of the guarantees designed for his protection. That is true, not only of the guarantee of a public trial, but also of other privileges equally basic. . . . [However,] [I]t is for the defendant alone to determine whether, and to what extent, he shall avail himself of them. To permit outsiders to interfere with the defendant's own conduct of his defense . . . could well redound to the defendant's exceeding prejudice. . . .

Actually, petitioners [the media] are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough, we suggest, to demonstrate that that cannot be, for it would deprive an accused of all power to waive his right to a public trial and thereby prevent him from taking a course

which he may believe best for his own interests." (emphasis in original)¹³

(c) Even if one were to assume, notwithstanding the explicit language of the "public trial" provision of the Sixth Amendment, that it may be extended both to pretrial proceedings and to a claim of right by a person other than the accused, it surely must be recognized, at the least, that the dominant concern of the Amendment is the protection of the accused. In a case, therefore, where the demand for publicity comes from an outsider to the proceedings and conflicts with a right of the accused specifically protected by the Sixth Amendment—the right to trial by an impartial jury—there can be no question that the right of the defendant must prevail. To hold otherwise would be to say that a "right" nowhere recognized in the

13. *Singer v. United States*, 380 U.S. 24, 34-35 (1965), cited by appellants (J.S. 16), involved neither the public trial provision of the Sixth Amendment nor the right of the media—rather than the defendant—to invoke Sixth Amendment rights. The case upheld the validity of Rule 23(a) of the Federal Rules of Criminal Procedure, which requires the government's consent for a defendant's jury-trial waiver to be effective, observing that "[t]he ability [of a defendant] to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." By way of example, the Court noted that, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial. . . ." In the context of the issues in *Singer*, this statement means at most that a State may, if it chooses, grant the prosecution the right to object to a non-public trial. *Singer* does not, however, suggest that there is any federal *constitutional right* of persons other than "the accused" to insist on Sixth Amendment protections; nor does it even remotely indicate that the media might have rights to interfere with trial procedures designed for the protection of litigants. The *Singer* Court emphasized that "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Id.* at 36 (emphasis added).

language of the Amendment may override the purposes unequivocally expressed.

3. Nor were appellants' First Amendment rights violated by the denial of access to the pretrial suppression hearings. Absent a showing of clear and present danger, the First Amendment prohibits a State from preventing a newspaper or broadcaster from publishing information about judicial proceedings that it has obtained for itself from public records, from attendance at public hearings, or from its own investigations. *Nebraska Press Assoc. v. Stuart, supra*; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Also, the Amendment presumably forbids exclusion of the press from trials or other judicial proceedings or records that are open to the general public. Cf. *Pell v. Procunier*, 417 U.S. 817, 835 (1974). The First Amendment does not, however, give the press any right to demand access to judicial proceedings that are not public in nature. As this Court made clear in *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972),

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . [T]he press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations.

In addition to traditionally confidential grand jury proceedings, juvenile proceedings and records are often closed to the press and public, see *Cox Broadcasting Co. v. Cohn, supra* at 496, n.26; *Oklahoma Publishing Co. v. District Court, supra*, as are pretrial conferences, guilty plea negotiations, and side-bar and in-chambers discus-

sions between judge and counsel. The decision of Pennsylvania, in common with other States, to follow strong professional recommendations to close pretrial suppression hearings to the public in the interest of protecting a defendant's right of fair trial, similarly raises no First Amendment problems.

This Court has, on several occasions, recognized the fundamental difference, for First Amendment purposes, between presumptively invalid governmental restraints on the publication of information in the possession of the press, and legitimate decisions to keep some governmental proceedings and information out of the public view. In addition to *Branzburg v. Hayes, supra*, see *Pell v. Procunier, supra* at 834-35 (emphasis added):

The First and Fourteenth Amendments bar government from interfering in any way with a free press. *The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.* It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . and that government cannot restrain the publication of news emanating from such sources It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

See also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965): "The right to speak and publish does not carry with it the unrestrained right to gather information."

The two cases principally relied upon by appellants in support of their First Amendment claim also recognize the distinction in the specific context of judicial proceedings. In *Cox Broadcasting Corp. v. Cohn, supra*, the Court

held that a state could not create a tort action for invasion of privacy based on the publication of information obtained from official court records open to the public: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." The Court specifically observed, however, that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." 420 U.S. at 496. And in *Nebraska Press Assoc. v. Stuart, supra*, the Court struck down "direct restraints on the press to prohibit publication" of potentially prejudicial information prior to trial, in part because less intrusive measures, such as "[c]losing of pretrial proceedings with the consent of the defendant," might have been employed. 427 U.S. at 701, n.8. Although the Court thus held in *Nebraska Press* that "once a public hearing had been held, what transpired there could not be subject to prior restraint," it expressly recognized that "closure of the preliminary hearing was an alternative open to" the trial court. See also the Court's most recent decision in this area, *Oklahoma Publishing Co. v. District Court, supra*. This case, which is not cited by appellants, carefully distinguishes, as do *Nebraska Press* and *Cox Broadcasting*, between the legitimate device of closing proceedings to the public and the unconstitutional effort to prevent the publication of information obtained at proceedings that were, in fact, open to the public.

The strict standards of the First Amendment are thus inapplicable to this case. That Amendment gives appellants the right, in the absence of a particularized showing of a clear and present danger, to be free from direct interference with their right to publish. It does not, however, confer a license to dictate the manner in which judicial or other governmental proceedings are conducted. "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975).

CONCLUSION

For the foregoing reasons, these appeals should be dismissed for want of a substantial federal question.

Respectfully submitted,

RALPH S. SPRITZER

PAUL BENDER

Attorneys for Appellees

November, 1977